THE SHERMAN ANTI-TRUST LAW

WHY IT HAS FAILED AND WHY IT SHOULD BE AMENDED.

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THE Sherman Anti-Trust Law makes criminal "every contract, combination, etc., in restraint of trade or commerce among the several States or with foreign nations."

In its present form, during the sixteen years that have elapsed since its passage, it has proved a failure. If it is to be useful hereafter, it must be made to define what kind of agreements in restraint of trade are illegal, and to exempt from its provisions those trade agreements which, while they may be in restraint of trade, operate either for the public welfare or at least in a manner not injurious to it. This is the day of the trade agreement. We see all over the country, in different lines of business, district, city, State and national associations of business men, formed for mutual protection and for the arranging of what might be termed the rules of trade. The business community already knows that there are certain agreements in restraint of trade which keep alive competition, and that are aimed at keeping it alive. They seek to substitute, among business men, the "live-and-let-live" policy for the policy of unrestrained competition. Most of the evils against which we cry are the outgrowth of unrestrained and unregulated competition. There is much complaint at times that a large corporation will sell below cost in a particular locality in order to destroy the local competitor, and thus enable it later to exercise a monopoly. An agreement among competitors, therefore, not to sell below cost may, in some instances, be of public benefit, as preserving a larger area of reasonable competition.

Of course, it may not be thus beneficial, but the point we wish

to make is that a trade agreement, whether it relates to prices or otherwise, is not of necessity criminal; that it may have either a good or a bad purpose; that it may simply preserve private rights and privileges of trade not detrimental to the public, and that, therefore, the Sherman Antitrust Law should not make criminal, as it now does, all agreements in restraint of trade. A law should no more assume that a trade agreement is criminal than the law assumes any individual guilty before trial.

Public policy, so far from indiscriminately making all such agreements guilty, should encourage any contract in restraint of trade which has for its object the maintenance of high standards in manufactured products, the abolition of deception in sales, the prevention of undue collections of perishable merchandise—like meats and fruits—at points where the demand cannot possibly equal the supply, so that a loss and waste are the results. It should discountenance any contract which has for its purpose the extorting of an unreasonable price.

As the law stands at present, it is subject to the following objections:

(1) As its principal section makes criminal, without further definition, an agreement in restraint of trade, it leaves to judicial determination the definition of the crime, and it has not yet been defined, but will only be defined as each case arises. The business community is therefore left in doubt as to what may constitute a crime under the law.

(2) It makes no distinction between those agreements in restraint of trade which are beneficial to the public and those which are detrimental. An agreement among competitors, for instance, to sell only pure, as distinguished from adulterated, goods is presumably as criminal under its provisions as one designed solely to extort unreasonable prices.

(3) Being indefinite in its definition of the crime and introducing into business an element of doubt and uncertainty as to trade agreements, it operates to the disadvantage of the scrupulous business man and in favor of the unscrupulous business man.

(4) The fact that trade agreements beneficial to the public, as well as those which are injurious, may alike be criminal under its provisions discourages the formation of good trade agreements and encourages the formation of evil ones. The first, because scrupulous men desire to take no risks with the law; the second,

because to unscrupulous men the risk of prosecution is less, since to include under any law good and bad acts as equally criminal inevitably discourages its enforcement.

(5) The general prosecution of our leading business men for that which may not be inherently criminal or opposed to public policy, which this law makes possible, would tend to have one of two results—it might lead them either to sell out their business as a whole to men willing to take risks with the law, which would be a public injury, or it might lead them to subdivide their business and sell it out to smaller concerns, thus lessening the economies of production and distribution, which would be a step backward in our commercial evolution and a public injury.

(6) The enforcement of this law, giving, necessarily, through its general terms, such wide latitude and discretion to executive officers in their right to proceed against corporations and individuals, is bound to create the appearance at least of favoritism in its application, and to result in lack of uniformity in the treatment of cases arising under it.

Without any intention of reflecting upon the rightful purpose of the Department of Justice in recent actions under the law, a few statements regarding them may illustrate this last point. In the Northern Securities case, a limited action was taken against the corporation only, and no attempt was made to hold the officers criminally. In the cases against the packers, the effort was made to hold them criminally liable. In this latter case, the Government found itself in the attitude of announcing through one Department, after a thorough investigation, that the business was not a monopoly and that its profits were reasonable, and seeking at the same time, through another Department, to put its owners in jail as public malefactors. The Northern Securities case was so presented to the courts that the reinstatement of the Chicago, Burlington & Quincy Railroad, as a competitor of the Northern Pacific and Great Northern Railways, was not involved in the decree. The decision did not affect the $215,000,000 Chicago, Burlington & Quincy Railway joint four-per-cent. bonds, guaranteed by the Northern Pacific and Great Northern Railways, and secured by the deposit of the bulk of the capital stock of the Chicago, Burligton & Quincy Railroad Company, which had been purchased by the other two roads. Thus it did not interfere with the device by which the operation was chiefly financed and the voting con-

trol of the competing Burlington road assured to the Northern Securities Company. As a consequence, when the Northern Securities Company was dissolved by the decision, the same interests remained in control of the railway situation in the Northwest, having that control represented by two separate stock certificates instead of by the single Northern Securities stock certificates as formerly.

We are not criticising the Department for not attacking the interests of the thousands of innocent holders of the Chicago, Burlington & Quincy Railway joint four-per-cent. bonds, and not attempting to compel them to submit to a change in their security. But from the beginning there was no hope that the Northern Securities case could have much practical effect, unless the final decision could scatter the stock control of the Chicago, Burlington & Quincy Railroad Company. This, it seems, could not equitably be done. The debenture bondholders had practically furnished the money to pay for the Chicago, Burlington & Quincy Railroad stock deposited as part security for their bonds, and under this plan had in effect also exchanged the voting power of the stock for the additional security afforded by the joint guaranty by the other two roads of the principal and interest of their bonds.

In this case the Department of Justice could not see its way clear to demand the full logical penalty either from the corporation or the individuals. If it had done so, it would probably have wrought more evil than good. As it was, it accomplished practically nothing. "The Saturday Evening Post," on July 15th, 1905, in commenting editorially on the "End of the Northern Securities," said:

> "A year hence, in all human probability, no patron of the Northern Pacific or Great Northern will know, save as a matter of history, that the Government won its great antimerger suit—any more than thousands of patrons of other combinations are now able to tell that those combinations have been solemnly banned by the law. In any undertaking the most important beginning is to find out what can and what cannot be done."

Certainly, some law, other than the Sherman Anti-Trust Law, is needed to deal with such situations as that presented by the Northern Securities case. And such a law should certainly provide for the determination, first, as to whether or not, as a matter

of fact, the consolidation worked, or would work, harm or benefit to the people of the section of the country affected. Then, if it was decided to be harmful, the remedy should be in the nature of an effort to restore the former conditions of competition. If it was decided not to be injurious, then the Government should, under the law, sanction it. Other instances could be given which with these cited indicate the impracticability of the Government's following any consistent course of procedure under such an indefinite law. How could uniformity of action be expected under a law which includes in its general condemnation that which is inherently innocent as well as that which is inherently guilty?

As a matter of experience, we know in this country that no law is tolerable if enforced, or useful if unenforced, which designates good and bad acts as alike criminal.

The Sherman Anti-Trust Law, in order to get at bad agreements in restraint of trade, makes all such agreements criminal. As some one has said: "It is like putting the whole community in the pest-house because some members of it have the smallpox."

Ill-considered and ill-advised legislation is worse than no legislation at all. Every unenforced and unenforceable law undermines proper respect for law.

In July, 1890, when the culminating years of a period of great prosperity had turned the mind of the public to questions relating rather to the distribution than the creating of wealth—a period of public disquietude like the present—the Sherman Anti-Trust Law was passed in response to an excited public demand. Because of its inherent defects, this law became practically a dead letter until recently, when an effort has been made to use it in response to a recurrence of public protest against corporate abuses. It seems to us very unfortunate that now, when the public interest in such questions is fully aroused, we do not have greater efforts on the part of our leaders to create wise public sentiment in favor of proper legislation regulating general corporations; and that, so far as the trust question is concerned, the chief endeavor to satisfy the public mind is made through selected civil and criminal cases under the defective Sherman law.

The Sherman Anti-Trust Law should cease to be a fetish to so many public men. The assertion that "not new laws, but present laws enforced, will cure our corporate abuses" should not pass unchallenged. In times of strong public feeling like the present,

public men are prone to take up popular legislation, and generally, but not always, popular legislation is needed legislation. Men seek to be known as advocating rate legislation, for instance, because it is popular. But, where a reform must be secured by the correction of over-radicalism in an ineffective existing law, like the Sherman Anti-Trust Law, and the advocacy of the change will bring from the radicals of the country castigation instead of applause, public men act with caution and the *status quo* generally prevails. Let us hope that, before this period of general interest in corporation questions is passed, the question of the amendment of the Sherman Anti-Trust Law will be taken up by Congress, and the law made more practical and enforceable by the clearer definition of what shall constitute illegality in trade agreements, and by the exemption from its provisions of such agreements in restraint of trade as are not injurious to the public.

The remarks of Marshall M. Kirkman, in his recent volume, "The Basis of Railway Rates," apply not only to the current discussion of that problem, but to corporations and corporation laws as well. He says:

"Exaggerations in discussions affecting corporations, whether on the part of managers or the public, is to be deplored in the interests of a right solution of the myriad questions of a public nature concerning them. Too much bitterness is shown in the controversy; too many things are being said having the air of private rancor, of personal feeling. Sharp phrases are being coined on both sides without much regard to the facts, all having a tendency to prevent calm consideration and an equitable adjustment of the matter. From whatever point of view the question is considered, it is never merely a question of silencing an opponent or influencing public opinion, but always of having the matter settled fairly, according to the rights of all concerned."

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